

Mulroy

609

Official Transcript of the American Military Tribunal
in the matter of the United States of America against
Wilhelm List, et al, defendants, sitting at Nurnberg,
Germany, on 19 February, 1948, 0930-1630, Justice
Wennerstrum, presiding.

THE MARSHAL: All persons in the Courtroom will please find their
seats.

The Honorable, the Judges of Military Tribunal V. Military Tribunal
V is now in session. God save the United States of America and this
Honorable Tribunal.

There will be order in the Court.

THE PRESIDENT: Mr. Marshal, you will ascertain whether all defendants
are present in the Courtroom.

THE MARSHAL: May it please Your Honors, all defendants are present
in the Courtroom.

THE PRESIDENT: This Tribunal has convened at this time for the
presentation of its opinion and judgment. The original will be filed
in the office of the Secretary-General. If there is any variation
from this original in the reading of this opinion or in the mimeo-
graphed copies the original shall constitute the official record of
this Tribunal. Judge Carter will read the first portion of the Opinion.
BY JUDGE CARTER:

In this case, the United States of America prosecutes each of the
defendants on one or more of four counts of an indictment charging
that each and all of said defendants unlawfully, wilfully and knowing-
ly committed war crimes and crimes against humanity as such crimes
are defined in Article II of Control Council Law No. 10. They are
charged with being principals in and accessories to the murder of
thousands of persons from the civilian population of Greece, Yugoslavia,
Norway and Albania between September 1939 and May 1945 by the use of
troops of the German Armed Forces under the command of and acting
pursuant to orders issued, distributed and executed by the defendants
at bar. It is further charged that these defendants participated in a
deliberate scheme of terrorism and intimidation wholly unwarranted and

unjustified by military necessity by the murder, ill-treatment and deportation to slave labor of prisoners of war and members of the civilian populations in territories occupied by the German Armed Forces, by plundering and pillaging public and private property, and wantonly destroying cities, towns and villages for which there was no military necessity. Upon these charges, each of the defendants except the defendant Boehme has been formally arraigned and a plea of not guilty accepted.

The Indictment alleges that the defendants committed the acts charged while occupying the positions hereafter shown during the periods of time indicated:

The defendant, Wilhelm List, was a General Feldmarschall (General of the Army) of the German Armed Forces, serving as Commander-in-Chief Twelfth Army from April 1941 to October 1941; Armed Forces Commander Southeast from June 1941 to October 1941; and as Commander-in-Chief Army Group A from July 1942 to September 1942.

The defendant, Maximilian von Weichs, was a General Feldmarschall (General of the Army) of the German Armed Forces, serving as Commander-in-Chief Second Army from April 1941 to July 1942; Commander-in-Chief Army Group B from July 1942 to February 1943; and Commander-in-Chief Army Group F and Supreme Commander Southeast from August 1943 to March 1945.

The defendant, Lothar Rendulic was a Generaloberst (General) in the German Armed Forces, serving as Commander-in-Chief Second Panzer Army from August 1943 to June 1944; Commander-in-Chief Twentieth Mountain Army from July 1944 to January 1945; Armed Forces Commander North from December 1944 to January 1945; Commander-in-Chief Army Group North from January 1945 to March 1945; Commander-in-Chief Army Group Courland from March 1945 to April 1945; and Commander-in-Chief Army Group South from April 1945 to May 1945.

The defendant, Walter Kuntze, was a General der Pioniere (Lieutenant General, Engineers) in the German Armed Forces, serving as Acting

Commander-in-Chief Twelfth Army from October 1941 to August 1942 and Deputy Armed Forces Commander Southeast during the same period.

The defendant Hermann Foertsch, was a General der Infanterie (lieutenant General, Infantry) in the German Armed Forces, serving as Chief of Staff Twelfth Army from May 1941 to August 1942; Chief of Staff Army Group E from August 1942 to August 1943; and Chief of Staff Army Group F from August 1943 to March 1944.

The defendant Franz Boehme, was a General der Gebirgstruppen (Lieutenant General, Mountain Troops) in the German Armed Forces, serving as Commander XVIII Mountain Army Corps from April 1941 to December 1941; Plenipotentiary Commanding General in Serbia from September 1941 to December 1941; and Commander-in-Chief Second Panzer Army from June 1944 to July 1944.

The defendant Heinrich Felmy was a General der Flieger (Lieutenant General, Air Force) in the German Armed Forces, serving as Commander Southern Greece from June 1941 to August 1942; and Commander LXVIII Army Corps from June 1943 to October 1944.

The defendant Hubert Lanz, was a General der Gebirgstruppen (lieutenant General, Mountain Troops) in the German Armed Forces, serving as Commander I Mountain Division from October 1940 to January 1943; and Commander XXII Mountain Army Corps from August 1943 to October 1944.

The defendant Ernst Dehner, was a General der Infanterie (Lieutenant General, Infantry) in the German Armed Forces, serving as Commander LXIX Army Reserve Corps from August 1943 to March 1944.

The defendant Ernst von Leyser, was a General der Infanterie (Lieutenant General, Infantry) in the German Armed Forces, serving as Commander XV Mountain Army Corps from November 1943 to July 1944; and Commander XXI Mountain Army Corps from July 1944 to April 1945.

The defendant Wilhelm Speidel, was a General der Flieger (Lieutenant General, Air Force) in the German Armed Forces, serving as Commander

Southern Greece from October 1942 to September 1943; and Military Commander Greece from September 1943 to June 1944.

The defendant Kurt von Geitner was a General Major (Brigadier General) in the German Armed Forces, serving as Chief of Staff to the Commanding General in Serbia from July 1942 to August 1943; and Chief of Staff to the Military Commander of Serbia and Military Commander Southeast from August 1943 to October 1944.

It is alleged in the indictment that the acts charged were violative of Control Council Law No. 10, duly enacted by the Allied Control Council on 20 December 1945. The portions of the law applicable to this case provide as follows:

"1 (b) War Crimes. Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, illtreatment or deportation to slave labor or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

" (c) Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

"2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission * * *.

"4 (b) The fact that any person acted pursuant to the order of his

government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation."

Pursuant to the provisions of Control Council Law No. 10, the pertinent parts of which are herein set out, the United States of America filed its indictment charging the defendants in four counts with War Crimes and Crimes against Humanity in accordance with the definitions thereof therein contained. Reduced to a minimum of words, these four counts charge:

1. That defendants were principals or accessories to the murder of hundreds of thousands of persons from the civilian population of Greece, Hugoslavia and Albania by troops of the German Armed Forces; that attacks by lawfully constituted enemy military forces, and attacks by unknown persons, against German troops and installations, were followed by executions of large numbers of the civilian population by hanging or shooting without benefit of investigation or trial; that thousands of non-combatants, arbitrarily designated as "partisans", "Communists", "Communist suspects", "bandit suspects" were terrorized, tortured and murdered in retaliation for such attacks by lawfully constituted enemy military forces and attacks by unknown persons; and that defendants issued, distributed and executed orders for the execution of 100 "hostages" in retaliation for each German soldier killed and 50 "hostages" in retaliation for each German soldier wounded.

2. That defendants were principals or accessories to the plundering and looting of public and private property, the wanton destruction of cities, towns and villages, frequently together with the murder of the inhabitants thereof,

and the commission of other acts of devastation not warranted by military necessity, in the occupied territories of Greece, Yugoslavia, Albania and Norway, by troops of the German Armed Forces acting at the direction and order of these defendants; that defendants ordered troops under their command to burn, level and destroy entire villages and towns and thereby making thousands of peaceful non-combatants homeless and destitute, thereby causing untold suffering, misery and death to large numbers of innocent civilians without any recognized military necessity for so doing.

3. That defendants were principals or accessories to the drafting, distribution and execution of illegal orders to the troops of the German Armed Forces which commanded, that enemy troops be refused quarter and be denied the status and rights of prisoners of war and surrendered members of enemy forces be summarily executed; that defendants illegally ordered that regular members of the national armies of Greece, Yugoslavia and Italy be designated as "partisans", "rebels", "communists" and "bandits", and that relatives of members of such national armies be held responsible for such members' acts of warfare, resulting in the murder and ill treatment of thousands of soldiers, prisoners of war and their non-combatant relatives.

4. That defendants were principals or accessories to the murder, torture, and systematic terrorization, imprisonment in concentration camps, forced labor on military installations, and deportation to slave labor, of the civilian populations of Greece, Yugoslavia and Albania by troops of the German Armed Forces acting pursuant to the orders of the defendants; that large numbers of citizens -

democrats, nationalists, Jews and Gypsies - were seized, thrown into concentration camps, beaten, tortured, ill-treated and murdered while other citizens were forcibly conscripted for labor in the Reich and occupied territories.

The acts charged in each of the four counts are alleged to have been committed wilfully, knowingly and unlawfully and constitute violations of international conventions, the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and were declared, recognized and defined as crimes by Article IV of Control Council Law No. 10 adopted by the representatives of the United States of America, Great Britain, the Republic of France and the Soviet Union.

The defendant Franz Boehme committed suicide prior to the arraignment of the defendants, and the Tribunal has ordered his name stricken from the list of defendants contained in the indictment. The defendant Maximillian von Weichs became ill during the course of the trial and it having been conclusively ascertained that he is physically unfit and unable to appear in court before the conclusion of the trial, his motion that the proceedings be suspended as to him was sustained. This holding is without prejudice to a future trial of this defendant on the charges herein made against him if and when his physical condition permits.

Before venturing into a discussion of specific issues, it seems advisable to briefly state the general nature of international law and the sources from which its principles can be ascertained. No attempt will be here

made to give an all inclusive definition of international law, in fact, there is justification for the assertion that it ought not to be circumscribed by strict definition in order that it may have ample room for growth. Any system of law that is obviously subject to growth by the crystallization of generally prevailing custom and practice into law under the impact of common acceptance or consent, must not be confined within the limits of formal pronouncement or complete unanimity. For our purposes it is sufficient to say that international law consists of the principles which control or govern relations between nations and their nationals. It is much more important to consider the sources from which these principles may be determined.

The sources of international law which are usually enumerated are: (1) customs and practices accepted by civilized nations generally, (2) treaties, conventions and other forms of interstate agreements, (3) the decisions of international tribunals, (4) the decisions of national tribunals dealing with international questions, (5) the opinions of qualified text writers, and (6) diplomatic papers. These sources provide a frame upon which a system of international law can be built but they cannot be deemed a complete legal system in themselves. Any system of jurisprudence, if it is to be effective, must be given an opportunity to grow and expand to meet changed conditions. The codification of principles is a helpful means of simplification, but it must not be treated as adding rigidity where resiliency is essential. To place the principles of international law in a formalistic straight-jacket would ultimately destroy any effectiveness that it has acquired.

The tendency has been to apply the term "customs

"and practices accepted by civilized nations generally", as it is used in international law, to the laws of war only. But the principle has no such restricted meaning. It applies as well to fundamental principles of justice which have been accepted and adopted by civilized nations generally. In determining whether such a fundamental rule of justice is entitled to be declared a principle of international law, an examination of the municipal laws of states in the family of nations will reveal the answer. If it is found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of international law would seem to be fully justified. There is convincing evidence that this not only is but has been the rule. The rules applied in criminal trials regarding burden of proof, presumption of innocence, and the right of a defendant to appear personally to defend himself, are derived from this source. Can it be doubted that such a source of international law would be applied to an insane defendant? Obviously he would not be subjected to trial during his incompetency. Clearly, such a holding would be based upon a fundamental principle of criminal law accepted by nations generally. If the rights of nations and the rights of individuals who become involved in international relations are to be respected and preserved, fundamental rules of justice and right which have become commonly accepted by nations must be applied. But the yardstick to be used must in all cases be a finding that the principle involved is a fundamental rule of justice which has been adopted or accepted by nations generally as such.

The defendants invoke the defensive plea that the acts charged as crimes were carried out pursuant to orders

COURT V, CASE VII.

of superior officers whom they were obliged to obey. This brings into operation the rule just announced. The rule that superior order is not a defense to a criminal act is a rule of fundamental criminal justice that has been adopted by civilized nations extensively. It is not disputed that the municipal law of civilized nations generally sustained the principle at the time the alleged criminal acts were committed. This being true, it properly may be declared as an applicable rule of international law.

It cannot be questioned that acts done in time of war under the military authority of an enemy, cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war. Implicit obedience to orders of superior officers is almost indispensable to every military system. But this implies obedience to lawful orders only. If the act done pursuant to a superior's orders be murder, the production of the order will not make it any less so. It may mitigate but it cannot justify the crime. We are of the view, however, that if the illegality of the order was not known to the inferior and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected. But the general rule is that members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice. In the German War Trials (1921), the German Supreme Court of Leipzig in The Llandovery Castle case said: "Patzig's order does not free the accused from guilt. It is true that according to

COURT V, CASE VII.

paragraph 47 of the Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable, the superior officer issuing such an order is alone responsible. According to No. 2, however, the subordinate obeying such an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law."

It is true that the foregoing rule compels a commander to make a choice between possible punishment by his lawless government for the disobedience of the illegal order of his superior officer, or that of lawful punishment for the crime under the law of nations. To choose the former in the hope that victory will cleanse the act of its criminal characteristics manifests only weakness of character and adds nothing to the defense.

We concede the serious consequences of the choice especially by an officer in the army of a dictator. But the rule becomes one of necessity, for otherwise the opposing army would in many cases have no protection at all against criminal excesses ordered by superiors.

The defense relies heavily upon the writings of Professor L. Oppenheim to sustain their position. It is true that he advocated this principle throughout his writings. As a co-author of the British Manual of Military Law, he incorporated the principle there. It seems also to have found its way into the United States Rules of Land Warfare (1940). We think Professor Oppenheim espoused a decidedly minority view. It is based upon the following rationale: "The law cannot require an individual to be punished for an act which he was compelled by law to commit." The statement completely overlooks the fact that

COURT V, CASE VII.

an illegal order is in no sense of the word a valid law which one is obliged to obey. The fact that the British and American Armies may have adopted it for the regulations of its own armies as a matter of policy, does not have the effect of enthroning it as a rule of international law. We point out that army regulations are not a competent source of international law. They are neither legislative nor judicial pronouncements. They are not competent for any purpose in determining whether a fundamental principle of justice has been accepted by civilized nations generally. It is possible, however, that such regulations, as they bear upon a question of custom and practice in the conduct of war, might have evidentiary value, particularly if the applicable portions had been put into general practice. It will be observed that the determination, whether a custom or practice exists, is a question of fact. Whether a fundamental principle of justice has been accepted, is a question of judicial or legislative declaration. In determining the former, military regulations may play an important role but in the latter, they do not constitute an authoritative precedent.

Those who hold to the view that superior order is a complete defense to an international law crime, base it largely on a conflict in the articles of war promulgated by several leading nations. While we are of the opinion that army regulations are not a competent source of international law, where a fundamental rule of justice is concerned, we submit that the conflict in any event does not sustain the position claimed for it. If, for example, one be charged with an act recognized as criminal under applicable principles of international law and pleads superior order as a defense thereto, the duty devolves

upon the court to examine the sources of international law to determine the merits of such a plea. If the court finds that the army regulations of some members of the family of nations provide that superior order is a complete defense and that the army regulations of other nations express a contrary view, the court would be obliged to hold, assuming for the sake of argument only that such regulations constitute a competent source of international law, that general acceptance or consent was lacking among the family of nations. Inasmuch as a substantial conflict exists among the nations whether superior order is a defense to a criminal charge, it could only result in a further finding that the basis does not exist for declaring superior order to be a defense to an international law crime. But, as we have already stated, army regulations are not a competent source of international law when a fundamental rule of justice is concerned. This leaves the war clear for the court to affirmatively declare that superior order is not a defense to an international law crime if it finds that the principle involved is a fundamental rule of justice and for that reason has found general acceptance.

International law has never approved the defensive plea of superior order as a mandatory bar to the prosecution of war criminals. This defensive plea is not available to the defendants in the present case, although if the circumstances warrant, it may be considered in mitigation of punishment under the express provisions of Control Council Law No. 10.

It is urged that Control Council Law No. 10 is an ex post facto act and retroactive in nature as to the crime charged in the indictment. The act was adopted on 20 December 1945, a date subsequent to the dates of the acts charged to be crimes. It is a fundamental principle of criminal jurisprudence that one may not be charged with crime for the doing of an act which was not a crime at the time of its commission. We think it could be said with justification that Article 23(h) of the Hague Regulations of 1907 operates as a bar to retroactive action in criminal matters. In any event, we are of the opinion that a victorious nation may not lawfully enact legislation defining a new crime and make it effective as to acts previously occurring which were not at the time unlawful. It therefore becomes the duty of a Tribunal trying a case charging a crime under the provisions of Control Council Law No. 10, to determine if the acts charged were crimes at the time of their commission and that Control Council Law No. 10 is in fact declaratory of then existing international law.

This very question was passed upon by the International Military Tribunal in the case of the United States v. Hermann Wilhelm Goering in its judgment entered on 1 October 1946. Similar provisions appearing in the Charter creating the International Military Tribunal and defining the crimes over which it had jurisdiction were held to be devoid of retroactive features in the following language: "The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent

is itself a contribution to international law." We adopt this conclusion . Any doubts in our mind concerning the rule thus announced go to its application rather than to the correctness of its statement. The crimes defined in Control Council Law No. 10 which we have quoted herein, were crimes under preexisting rules of international law, -- some by conventional law and some by customary law. It seems clear to us that the conventional law such as that exemplified by the Hague Regulations of 1907 clearly make the War Crimes herein quoted, crimes under the proceedings of that convention. In any event, the practices and usages of war which gradually ripened into recognized customs with which belligerents were bound to comply, recognized the crimes specified herein as crimes subject to punishment. It is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute or treaty if it is made a crime by international convention, recognized customs and usages of war, or the general principles of criminal justice common to civilized nations generally. If the acts charged were in fact crimes under International law when committed, they cannot be said to be ex post facto acts or retroactive pronouncements.

The crimes specified in the London Charter and defined in Control Council Law No. 10 which have heretofore been set forth and with which these defendants are charged, merely restate the rules declared by the Hague Regulations of 1907 in Articles 43, 46, 47, 50 and 23(h) of the regulations annexed thereto which provide:

Art. 43 "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure as far as possible public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Art. 46 "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."

Art. 47. "Pillage is formally forbidden."

Art. 50. "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."

Art. 23 (h). "(In addition to the prohibitions provided by special Conventions, it is especially forbidden) to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party."

We conclude that preexisting international law has declared the acts constituting the crimes herein charged and included in Control Council Law No. 10 to be unlawful, both under the conventional law and the practices and usages of land warfare that had ripened into recognized customs which belligerents were bound to obey. Anything in excess of existing international law therein contained in a utilization of power and not of law. It is true, of course, that courts authorized to hear such cases were not established nor the penalties to be imposed for violations set forth. But this is not fatal to their validity. The acts prohibited are without deterrent effect unless they are punishable as crimes. This subject was dealt with in the International Military Trial in the following language: "But it is argued that the pact does not expressly enact that such (aggressive) wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes; punishable as offenses against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years last past, however, military tribunals have tried and

punished individuals guilty of violating the rules of land warfare laid down by this Convention. * * * The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing."

It is true, of course, that customary international law is not static. It must be elastic enough to meet the new conditions that natural progress brings to the world. It might be argued that this requires a certain amount of retroactive application of new rules and that by conceding the existence of a customary international law, one thereby concedes the legality of retroactive pronouncements. To a limited extent the argument is sound, but when it comes in conflict with a rule of fundamental right and justice, the latter must prevail. The rule that one may not be charged with crime for committing an act which was not a crime at the time of its commission is such a right. The fact that it might be found in a constitution or bill of rights does not detract from its status as a fundamental principle of justice. It cannot properly be changed by retroactive action to the prejudice of one charged with a violation of the laws of war.

An international crime is such an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances. The inherent nature of a war crime is ordinarily itself sufficient justification for jurisdiction to attach in the courts of the belligerent into whose hands the alleged criminal has fallen.

Some war crimes, such as spying, are not common law crimes at all; they being pure war crimes punishable as such during the war and, in this

particular case, only if the offender is captured before he rejoins his army. But some other crimes, such as mass murder, are punishable during and after the war. But such crimes are also war crimes because they were committed under the authority or orders of the belligerent who, in ordering or permitting them, violated the rules of warfare. Such crimes are punishable by the country where the crime was committed or by the belligerent into whose hands the criminals have fallen, the jurisdiction being concurrent. There are many reasons why this must be so, not the least of which is that war is usually followed by political repercussions and upheavals which at times place persons in power who are not, for one reason or another, inclined to punish the offenders. The captor belligerent is not required to surrender the alleged war criminal when such surrender is equivalent to a passport to freedom. The only adequate remedy is the concurrent jurisdictional principle to which we have heretofore adverted. The captor belligerent may therefore surrender the alleged criminal to the state where the offense was committed, or, on the other hand, it may retain the alleged criminal for trial under its own legal processes.

It cannot be doubted that the occupying powers have the right to set up special courts to try those charged with the commission of War Crimes as they are defined by international law. *Ex Parte Guerin*, 317 U.S. 1, *In Re Yamashita*, 327 U.S. 1. Nor can it be said that the crimes herein charged are invalid as retroactive pronouncements, - they being nothing more than restatements of the conventional and customary law of nations governing the rules of land warfare, restricted by charter provisions limiting the jurisdiction of the Tribunal by designating the class of cases it is authorized to hear. The elements of an ex post facto act or a retroactive pronouncement are not present insofar as the crimes charged in the instant case are concerned.

The argument that defendants cannot be tried before this Tribunal is without force. It is urged they can only be properly tried in

accordance with the international principles laid down in Article 63 of the Geneva Convention of 1929 relative to the treatment of prisoners of war. We submit that the provision applies only to crimes and offenses committed while occupying the status of a prisoner of war and confers no jurisdiction over a violation of international law committed prior to the time of becoming such.

In the recent case of *In Re Yamashita*, 327 U.S. 1, 66 Sup. Ct. 348, the Supreme Court of the United States arrived at this conclusion in the following language: "But we think examination of Article 63 in its setting in the Convention plainly shows that it refers to sentences 'pronounced against a prisoner of war' for an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant."

The defendants at bar are charged only with crimes alleged to have been committed as combatants before they became prisoners of war. We hold, therefore, that no rights under Article 63 of the Geneva Convention of 1929 can accrue to them in the present case. The jurisdictional question raised is without merit.

It is essential to a proper understanding of the issues involved in the present case, that the status of Yugoslavia, Greece and Norway be determined during the periods that the alleged criminal acts of these defendants were committed. The question of criminality in many cases may well hinge on whether an invasion was in progress or an occupation accomplished. Whether an invasion has developed into an occupation is a question of fact. The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied.

The evidence shows that the invasion of Yugoslavia was commenced on April 6, 1941. Nine days later the Yugoslav government capitulated and on April 16, 1941, large scale military operations had come to an end. The powers of government passed into the hands of the German Armed Forces and Yugoslavia became an occupied country. The invasion of Yugoslavia followed through into Greece. On the 22nd of April, 1941, the Greek Armed Forces in the north were forced to surrender and on April 28th, 1941, Athens fell to the invader. On and after that date Greece became an occupied country within the meaning of existing international law.

The evidence shows that the population remained peaceful during the spring of 1941. In the early summer following, a resistance movement began to manifest itself. It increased progressively in intensity until it assumed the appearance of a military campaign. Partisan bands, composed of members of the population roamed the territory, doing much damage to transportation and communication lines. German soldiers were the victims of surprise attacks by an enemy which they could not engage in open combat. After a surprise attack, the bands would hastily retreat or conceal their arms and mingle with the population with the appearance of being harmless members thereof. Ambushing of German troops was a common

practice. Captured German soldiers were often tortured and killed. The terrain was favorable to this type of warfare and the inhabitants most adept in carrying it on.

It is clear that the German Armed Forces were able to maintain control of Greece and Yugoslavia until they evacuated them in the fall of 1944. While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary only and not such as would deprive the German Armed Forces of its status of an occupant.

These findings are consistent with Article 42 of the Hague Regulations of 1907 which provide: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

It is the contention of the defendants that after the respective capitulations a lawful belligerency never did exist in Yugoslavia or Greece during the period here involved. The prosecution contends just as emphatically that it did. The evidence on the subject is fragmentary and consists primarily of admissions contained in the reports, orders, and diaries of the German Army units involved. There is convincing evidence in the record that certain band units in both Yugoslavia and Greece complied with the requirements of international law entitling them to the status of a lawful belligerent. But the greater portion of the partisan bands failed to comply with the rules of war entitling them to be accorded the rights of a lawful belligerent. The evidence fails to establish beyond a reasonable doubt that the incidents involved in the present case concern partisan troops having the status of lawful belligerents.

The evidence shows that the bands were sometimes designated as units common to military organization. They, however, had no common uniform.

They generally wore civilian clothes although parts of German, Italian and Serbian uniforms were used to the extent they could be obtained. The Soviet Star was generally worn as insignia. The evidence will not sustain a finding that it was such that it could be seen at a distance. Neither did they carry their arms openly except when it was to their advantage to do so. There is some evidence that various groups of the resistance forces were commanded by a centralized command, such as the partisans of Marshal Tito, the Chetniks of Draja Mihailovitch and the Edes of General Zervas. It is evidence also that a few partisan bands met the requirements of lawful belligerency. The bands, however, with which we are dealing in this case were not shown by satisfactory evidence to have met the requirements. This means, of course, that captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can be properly charged against the defendants for the killing of such captured members of the resistance forces, they being franc-tireurs.

The status of an occupant of the territory of the enemy having been achieved, international law places the responsibility upon the commanding general of preserving order, punishing crime and protecting lives and property within the occupied territory. His power in accomplishing these ends is as great as his responsibility. But he is definitely limited by recognized rules of international law, particularly the Hague Regulations of 1907. Article 43 thereof imposes a duty upon the occupant to respect the laws in force in the country. Article 46 protects family honor and rights, the lives of individuals and their private property as well as their religious convictions and the right of public worship. Article 47 prohibits pillage. Article 50 prohibits collective penalties. Article 51 regulates the appropriation of properties belonging to the state or private individuals which may be useful in military operations. There are other restrictive provisions not necessary to mention here. It is the alleged violation of these rights of the inhabitants thus protected that furnish the basis of the case against

the defendants.

The evidence is clear that during the period of occupation in Yugoslavia and Greece, guerrilla warfare was carried on against the occupying power. Guerrilla warfare is said to exist where, after the capitulation of the main part of the armed forces, the surrender of the government and the occupation of its territory, the remnant of the defeated army or the inhabitants themselves continue hostilities by harassing the enemy with unorganized forces ordinarily not strong enough to meet the enemy in pitched battle. They are placed much in the same position as a spy. By the law of war it is lawful to use spies. Nevertheless, a spy when captured, may be shot because the belligerent has the right, by means of an effective deterrent punishment, to defend against the grave dangers of enemy spying. The principle therein involved applies to guerrillas who are not lawful belligerents. Just as the spy may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes even, still they remain war criminals in the eyes of the enemy and may be treated as such. In no other way can an army guard and protect itself from the gadfly tactics of such armed resistance. And, on the other hand, members of such resistance forces must accept the increased risks involved in this mode of fighting. Such forces are technically not lawful belligerents and are not entitled to protection as prisoners of war when captured. The rule is based on the theory that the forces of two states are no longer in the field and that a contention between organized armed forces no longer exists. This implies that a resistance not supported by an organized government is criminal and deprives participants of belligerent status, an implication not justified since the adoption of Chapter I, Article I of the Hague Regulations of 1907. In determining the guilt or innocence of any army commander when charged with a failure or refusal to accord a belligerent status to captured members of the resistance forces, the situation

as it appeared to him must be given the first consideration. Such commander will not be permitted to ignore obvious facts in arriving at a conclusion. One trained in military science will ordinarily have no difficulty in arriving at a correct decision and if he wilfully refrains from so doing for any reason, he will be held criminally responsible for wrongs committed against those entitled to the rights of a belligerent. Where room exists for an honest error in judgment, such army commander is entitled to the benefit thereof by virtue of the presumption of his innocence.

We think the rule is established that a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the laws of war. Fighting is legitimate only for the combatant personnel of a country. It is only this group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender.

It is contended by the prosecution that the so-called guerrillas were in fact irregular troops. A preliminary discussion of the subject is essential to a proper determination of the applicable law. Members of militia or a volunteer corps, even though they are not a part of the regular army, are lawful combatants if (a) they are commanded by a responsible person, (b) if they possess some distinctive insignia which can be observed at a distance, (c) if they carry arms openly, and (d) if they observe the laws and customs of war. See Chapter I, Article I, Hague Regulations of 1907. In considering the evidence adduced on this subject, the foregoing rules will be applied. The question whether a captured fighter is a guerrilla or an irregular is sometimes a close one that can be determined only by a careful evaluation of the evidence before the court.

The question of the right of the population of an invaded and occupied country to resist has been the subject of many conventional debates. (Brussels Conference of 1874; Hague Peace Conference of 1899). A review of the positions assumed by the various nations can serve no useful

purpose here for the simple reason that a compromise (Hague Regulations, 1907) was reached which has remained the controlling authority in the fixing of a legal belligerency. If the requirements of the Hague Regulation, 1907, are met, a lawful belligerency exists; if they are not met, it is an unlawful one.

The prosecution advances the contention that since Germany's wars against Yugoslavia and Greece were aggressive wars, the German occupation troops were there unlawfully and gained no rights whatever as an occupant. It is further asserted as a corollary, that the duties owed by the populace to an occupying power which are normally imposed under the rules of international law, never became effective in the present case because of the criminal character of the invasion and occupation.

For the purposes of this discussion, we accept the statement as true that the wars against Yugoslavia and Greece were in direct violation of the Kellogg-Briand Pact and were therefore criminal in character. But it does not follow that every act by the German occupation forces against person or property is a crime or that any and every act undertaken by the population of the occupied country against the German occupation forces thereby became legitimate defense. The prosecution attempts to simplify the issue by posing it in the following words: "The sole issue here is whether German forces can with impunity violate law by initiating and waging wars of aggression and at the same time demand meticulous observance by the victims of these crimes of duties and obligations owed only to a lawful occupant."

At the outset, we desire to point out that international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.

It must not be overlooked that international law is prohibitive law. Where the nations have affirmatively acted, as in the case of the Hague Regulations, 1907, it prohibits conduct contradictory thereto. Its specific provisions control over general theories, however reasonable they may seem. We concur in the views expressed in the following text on the subject: "Whatever may be the cause of a war that has broken out, and whether or no the cause be a so-called just cause, the same rules of International Law are valid as to what must not be done, and must be done by the belligerents themselves in making war against each other, and as between the belligerents and neutral States. This is so, even if the declaration of war is ipso facto a violation of International Law, as when a belligerent declares war upon a neutral State for refusing passage to its troops, or when a State goes to war in patent violation of its obligations under the Covenant of the League or of the General Treaty for the Renunciation of War. To say that, because such a declaration of war is ipso facto a violation of International Law, it is 'inoperative in law and without any judicial significance,' is erroneous. The rules of International Law apply to war from whatever cause it originates." Oppenheim's International Law, II Lauterpacht, P. 174.

The major issues involved in the present case gravitates around the claimed right of the German Armed Forces to take hostages from the innocent civilian population to guarantee the peaceful conduct of the whole of the civilian population and its claimed right to execute hostages, members of the civil population, and captured members of the resistance forces in reprisal for armed attacks by resistance forces, acts of sabotage and injuries committed by unknown persons.

We wholly exclude from the following discussions of the subject of hostages the right of one nation to take them, to compel the armed forces of another nation to comply with the rules of war or the right to execute them if the enemy ignores the warning. We limit our discussion to

the right to take hostages from the innocent civilian population of occupied territory as a guaranty against attacks by unlawful resistance forces, acts of sabotage and the unlawful acts of unknown persons and the further right to execute them if the unilateral guaranty is violated.

Neither the Hague Convention of 1907, nor any other conventional law for that matter, says a word about hostages in the sense that we are to use the term in the following discussion. But certain rules of customary law and certain inferences legitimately to be drawn from existing conventional law lay down the rules applicable to the subject of hostages. In former times prominent persons were accepted as hostages as a means of insuring observance of treaties, armistices and other agreements, the performance of which depended on good faith. This practice is now obsolete. Hostages under the alleged modern practice of nations are taken (a) to protect individuals held by the enemy, (b) to force the payment of requisitions, contributions, and the like, and (c) to insure against unlawful acts by enemy forces or people. We are concerned here only with the last provision. That hostages may be taken for this purpose cannot be denied.

The question of hostages is closely integrated with that of reprisals. A reprisal is a response to an enemy's violation of the laws of war which would otherwise be a violation on one's own side. It is a fundamental rule that a reprisal may not exceed the degree of the criminal act it is designed to correct. Where an excess is knowingly indulged, it in turn is criminal and may be punished. Where innocent individuals are seized and punished for a violation of the laws of war which has already occurred, no question of hostages is involved. It is nothing more than the infliction of a reprisal. Throughout the evidence in the present case, we find the term hostage applied where a reprisal only was involved.

Under the ancient practice of taking hostages they were held responsible for the good faith of the persons who delivered them, even at the price of their lives. This barbarous practice was wholly abandoned by a more enlightened civilization. The idea that an innocent person may be killed for the criminal act of another is abhorrent to every natural law. We condemn the injustice of any such rule as a barbarous relic of ancient times. But it is not our province to write international law as we would have it, - we must apply it as we find it.

For the purposes of this opinion the term "hostages" will be considered as those persons of the civilian population who are taken into custody for the purpose of guaranteeing with their lives the future good conduct of the population of the community from which they were taken. The term "reprisal prisoners" will be considered as those individuals who are taken from the civilian population to be killed in retaliation for offenses committed by unknown persons within the occupied area.

An examination of the available evidence on the subject convinces us that hostages may be taken in order to guarantee the peaceful conduct of the populations of occupied territories and, when certain conditions exist and the necessary preliminaries have been taken, they may, as a last resort, be shot. The taking of hostages is based fundamentally on a theory of collective responsibility. The effect of an occupation is to confer upon the invading force the right of control for the period of the occupation within the limitations and prohibitions of international law. The inhabitants owe a duty to carry on their ordinary peaceful pursuits and to refrain from all injurious acts toward the troops or in respect to their military operations. The occupant may properly insist upon compliance with regulations necessary to the security of the occupying forces and for the maintenance of law and order. In the accomplishment of this objective, the occupant may only, as a last resort, take and execute hostages.

Hostages may not be taken or executed as a matter of military expediency. The occupant is required to use every available method to secure

order and tranquility before resort may be had to the taking and execution of hostages. Regulations of all kinds must be imposed to secure peace and tranquility before the shooting of hostages may be indulged.

These regulations may include one or more of the following measures:

(1) the registration of the inhabitants, (2) the possession of passes or identification certificates, (3) the establishment of restricted areas, (4) limitations of movement, (5) the adoption of curfew regulations, (6) the prohibition of assembly, (7) the detention of suspected persons, (8) restrictions on communication, (9) the imposition of restrictions on food supplies, (10) the evacuation of troublesome areas, (11) the levying of monetary contributions, (12) compulsory labor to repair damage from sabotage, (13) the destruction of property in proximity to the place of the crime, and any other regulation not prohibited by international law that would in all likelihood contribute to the desired result.

If attacks upon troops and military installations occur regardless of the foregoing precautionary measures and the perpetrators cannot be apprehended, hostages may be taken from the population to deter similar acts in the future provided it can be shown that the population generally is a party to the offense, either actively or passively. Nationality or geographic proximity may under certain circumstances afford a basis for hostage selection, depending upon the circumstances of the situation. This arbitrary basis of selection may be deplored but it cannot be condemned as a violation of international law, but there must be some connection between the population from whom the hostages are taken and the crime committed. If the act was committed by isolated persons or bands from distant localities without the knowledge or approval of the population or public authorities, and which, therefore, neither the authorities nor the population could have prevented, the basis for the taking of hostages, or the shooting of hostages already taken, does not exist.

It is essential to a lawful taking of hostages under customary law that proclamation be made, giving the names and addresses of hostages taken, notifying the population that upon the recurrence of stated acts of war treason that the hostages will be shot. The number of hostages shot must not exceed in severity the offenses the shooting is designed to deter. Unless the foregoing requirements are met, the shooting of hostages is in contravention of international law and is a war crime in itself. Whether such fundamental requirements have been met is a question determinable by court martial proceedings. A military commander may not arbitrarily determine such facts. An order of a military commander for the killing of hostages must be bottomed upon the finding of a competent court martial that necessary conditions exist and all preliminary steps have been taken which are essential to the issuance of a valid order. The taking of the lives of innocent persons arrested as hostages is a very serious step. The right to kill hostages may be lawfully exercised only after a meticulous compliance with the foregoing safeguards against vindictive or whimsical orders of military commanders.

We are also concerned with the subject of reprisals and the detention of members of the civilian population for the purpose of using them as the victims of subsequent reprisal measures. The most common reason for holding them is for the general purpose of securing the good behavior and obedience of the civil population in occupied territory. The taking of reprisals against the civilian population by killing members thereof in retaliation for hostile acts against the armed forces or military operations of the occupant seems to have been originated by Germany in modern times. It has been invoked by Germany in the Franco-Prussian War, World War I and in World War II. No other nation has resorted to the killing of members of the civilian population to secure peace and order insofar as our investigation has revealed. The evidence offered in this case on that point will be considered later in the opinion.

While American, British and French manuals for armies in the field seem to permit the taking of such reprisals as a last resort, the provisions do not appear to have been given effect. The American manual provides in part: "The offending forces or populations generally may lawfully be subjected to appropriate reprisals. Hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or "people may be punished or put to death if the unlawful acts are nevertheless committed." FM 27-10, Rules of Land Warfare, 1940, Sec. 358d. The British field manual provides in part: "Although collective punishment of the population is forbidden for the acts of individuals for which it cannot be regarded as collectively responsible, it may be necessary to resort to reprisals against a locality or community, or members, who cannot be identified," British Military Hand Book, Art. 458.

In two major wars within the last thirty years, Germany has made extensive use of the practice of killing innocent members of the population as a deterrent to attacks upon its troops and acts of sabotage against installations essential to its military operations. The right to so do has been recognized by many nations including the United States, Great Britain, France and the Soviet Union. There has been complete failure on the part of the nations of the world to limit or mitigate the practice by conventional rule. This requires us to apply customary law. That international agreement is badly needed in this field is self-evident.

International law is prohibitive law and no conventional prohibitions have been invoked to outlaw this barbarous practice. The extent to which the practice has been employed by the Germans exceeds the most elementary notions of humanity and justice. They invoke the plea of military necessity, a term which they confuse with convenience and strategical interests. Where legality and expediency have coincided, no fault can be found insofar as international law is concerned. But where legality of action is absent, the shooting of innocent members of the population as a measure of reprisal is not only criminal but it has the

effect of destroying the basic relationship between the occupant and the population. Such a condition can progressively degenerate into a reign of terror. Unlawful reprisals may bring on counter reprisals and create an endless cycle productive of chaos and crime. To prevent a distortion of the right into a barbarous method of repression, international law provides a protective mantle against the abuse of the right.

Generally it can be said that the taking of reprisal prisoners, as well as the taking of hostages, for the purpose of controlling the population involves a previous proclamation that if a certain type of act is committed, a certain number of reprisal prisoners will be shot if the perpetrators cannot be found. If the perpetrators are apprehended, there is no right to kill either hostages or reprisal prisoners.

As in the case of the taking of hostages, reprisal prisoners may not be shot unless it can be shown that the population as a whole is a party to the offense, either actively or passively. In other words, members of the population of one community cannot properly be shot in reprisal for an act against the occupation forces committed at some other place. To permit such a practice would conflict with the basic theory that sustains the practice in that there would be no deterrent effect upon the community where the offense was committed. Neither may the shooting of innocent members of the population as a reprisal measure exceed in severity the unlawful acts it is designed to correct. Excessive reprisals are in themselves criminal and guilt attaches to the persons responsible for their commission.

It is a fundamental rule of justice that the lives of persons may not be arbitrarily taken. A fair trial before a judicial body affords the surest protection against arbitrary, vindictive or whimsical application of the right to shoot human beings in reprisal. It is a rule of international law, based on these fundamental concepts of justice and the rights of individuals, that the lives of persons may not be taken in reprisal in the absence of a judicial finding that the necessary conditions

exist and the essential steps have been taken to give validity to such action. The possibility is great, of course, that such judicial proceedings may become ritualistic and superficial when conducted in wartime but it appears to be the best available safeguard against cruelty and injustice. Judicial responsibility ordinarily restrains impetuous action and permits principles of justice and right to assert their humanitarian qualities. We have no hesitancy in holding that the killing of members of the population in reprisal without judicial sanction is itself unlawful. The only exception to this rule is where it appears that the necessity for the reprisal requires immediate reprisal action to accomplish the desired purpose and which would be otherwise defeated by the invocation of judicial inquiry. Unless the necessity for immediate action is affirmatively shown, the execution of hostages or reprisal prisoners without a judicial hearing is unlawful. The judicial proceeding not only affords a measure of protection to innocent members of the population, but it offers, if fairly and impartially conducted, a measure of protection to the military commander, charged with making the final decision.

It cannot be denied that the shooting of hostages or reprisal prisoners may under certain circumstances be justified as a last resort in procuring peace and tranquility in occupied territory and has the effect of strengthening the position of a law abiding occupant. The fact that the practice has been tortured beyond recognition by illegal and inhuman application can not justify its prohibition by judicial fiat.

Military necessity has been invoked by the defendants as justifying the killing of innocent members of the population and the destruction of villages and towns in the occupied territory. Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and

to facilitate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communication or any other property that might be utilized by the enemy. Private homes and churches even may be destroyed if necessary for military operations. It does not admit of wanton devastation of a district or the wilful infliction of suffering upon its inhabitants for the sake of suffering alone.

The issues in the present case raise grave questions of international law. Military men the world over debate both the law and the policy involved in the prosecution for war crimes of the high ranking commanders of defeated armies. This is partially brought about by the possibility of future wars and the further possibility that the victors of the present may be the vanquished of the future. This only serves to impress the Tribunal with the absolute necessity of affording the defendants a fair and impartial trial under the rules of international law as they were at the time the alleged offenses were committed. Unless this be done, the hand of injustice may fall upon those who so vindictively contend for more far-reaching pronouncements, sustained by precedents which we would hereby establish.

Strict discipline is necessary in the organization of an army and it becomes hard for many to believe that a violation of the orders of a superior may bring about criminal liability. Love of country and adherence to duty intervene to palliate unlawful conduct. The passage of time and the thankfulness for a return to peaceful pursuits tend to lessen the

19 Feb.-M-MW-5-8-Stone (Int.Schaeffer)
COURT V, CASE VII

demand that war criminals answer for their crimes. In addition thereto, there is a general feeling that excesses occur in all armies, no matter how well disciplined, and that military trials are held to convict war criminals of the vanquished while those of the victor are cleansed by victory. Unless civilization is to give way to barbarism in the conduct of war, crime must be

punished. If international law as it applies to a given case is hopelessly inadequate, such inadequacy should be pointed out. If customary international law has become outmoded, it should be so stated. If conventional international law sets forth an unjust rule, its enforcement will secure its correction. If all war criminals are not brought to the bar of justice under present procedures, such procedures should be made more inclusive and more effective. If the laws of war are to have any beneficent effect, they must be enforced.

The evidence in this case recites a record of killing and destruction seldom exceeded in modern history. Thousands of innocent inhabitants lost their lives by means of a firing squad or hangman's noose, -- people who had the same inherent desire to live as do these defendants. Wherever the German Armed Forces were found, there also were the SS (Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei), the SD (Die Sicherheitsdienst des Reichsfuehrers), the Gestapo (Die Geheime Staatspolizei), the SA (Die Sturmabteilungen der Nationalsozialistischen Deutschen Arbeiterpartei), the administrators of Goering's Four Year Plan and the Einsatzstab Rosenberg, all participating in the administration of the occupied territories in varying degrees. Mass shootings of the innocent population, deportations for slave labor and the indiscriminate destruction of public and private property, not only in Yugoslavia and Greece but in many other countries as well, lend credit to the assertion that terrorism and intimidation was the accepted solution to any and all opposition to the German will. It is clear, also, that this had become a general practice and a major weapon of warfare by the German Wehrmacht. The German attitude seems to be reflected in the introduction to the German War Book, as translated by J. H. Morgan on Pages 53, 54 and 55 wherein it is stated: "If therefore, in the following work the expression 'the law of war' is used, it must be understood that by it is meant not a lex scripta introduced by international agreements; but only a reciprocity of mutual agreement; a limitation of arbitrary behaviour, which custom and conventionality, human friendliness and a calculating egotism have erected, but for the observance of which there exists no

express sanction, but only 'the fear of reprisals' decides. *** Moreover the officer is a child of his time. He is subject to the intellectual tendencies which influence his own nation; the more educated he is the more will this be the case. The danger that, in this way, he will arrive at false views about the essential character of war must not be lost sight of. The danger can only be met by a thorough study of war itself. By steeping himself in military history an officer will be able to guard himself against excessive humanitarian notions, it will teach him that certain severities are indispensable to war, nay more, that the only true humanity very often lies in a ruthless application of them. It will also teach him how the rules of belligerent intercourse in war have developed, how in the course of time they have solidified into general usages of war, and finally it will teach him whether the governing usages of war are justified or not, whether they are to be modified or whether they are to be observed."

It is apparent from the evidence of these defendants that they considered military necessity, a matter to be determined by them, a complete justification of their acts. We do not concur in the view that the rules of warfare are anything less than they purport to be. Military necessity or expediency do not justify a violation of positive rules. International law is prohibitive law. Articles 46, 47 and 50 of the Hague Regulations of 1907 make no such exceptions to its enforcement. The rights of the innocent population therein set forth must be respected even if military necessity or expediency decree otherwise. We have hereinbefore pointed out that it is the duty of the commanding general in occupied territory to maintain peace and order, punish crime and protect lives and property. This duty extends not only to the inhabitants of the occupied territory but to his own troops and auxiliaries as well. The commanding general of occupied territory having executive authority as well as military command, will not be heard to say that a unit taking unlawful orders from someone other than himself, was responsible for the crime and that he is thereby absolved from responsibility. It is here

claimed, for example, that certain SS units under the direct command of Heinrich Himmler committed certain of the atrocities herein charged without the knowledge, consent or approval of these defendants. But this cannot be a defense for the commanding general of occupied territory. The duty and responsibility for maintaining peace and order, and the prevention of crime rests upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defense. The fact is that the reports of subordinate units almost without exception advised these defendants of the policy of terrorism and intimidation being carried out by units in the field. They requisitioned food supplies in excess of their local need and caused it to be shipped to Germany in direct violation of the laws of war. Innocent people were lodged in collection and concentration camps where they were mistreated to the everlasting shame of the German nation. Innocent inhabitants were forcibly taken to Germany and other points for use as slave labor. Jews, gypsies and other racial groups were the victims of systematized murder or deportation for slave labor for no other reason than their race or religion, which is in violation of the express conventional rules of the Hague Regulations of 1907. The German theory that fear of reprisal is the only deterrent in the enforcement of the laws of war cannot be accepted here. That reprisals may be indulged to compel an enemy nation to comply with the rules of war must be conceded.

It is not, however, an exclusive remedy. If it were, the persons responsible would seldom, if ever, be brought to account. The only punishment would fall upon the reprisal victims who are usually innocent of wrong-doing. The prohibitions of the Hague Regulations of 1907 contemplate no such system of retribution. Those responsible for such crimes by ordering or authorizing their commission, or by a failure to take effective steps to prevent their execution or recurrence, must be held to account if international law is to be anything more than an ethical code, barren of any practical coercive deterrent.

That the acts charged as crimes in the indictment occurred is amply established by the evidence. In fact it is evident that they constitute

only a portion of the large number of such acts which took place as a part of a general plan for subduing the countries of Yugoslavia and Greece. The guilt of the German occupation forces is not only proven beyond a reasonable doubt but it casts a pall of shame upon a once highly respected nation and its people. The defendants themselves recognize this situation when they decry the policies of Hitler and assert that they continually protested against orders of superiors issued in conformity with the plan of terrorism and intimidation.

It is the determination of the connection of the defendants with the acts charged and the responsibility which attaches to them therefore, rather than the commission of the acts, that poses the chief issue to be here decided.

Objection has been made that the documents offered in evidence by the prosecution are not the original instruments but photostatic copies only. No objection of this character was made at the time the exhibits were offered and received in evidence. In view of the fact that this objection was not timely made, it cannot receive the consideration of the tribunal.

The record is replete with testimony and exhibits which have been offered and received in evidence without foundation as to their authenticity and, in many cases where it is secondary in character, without proof of the usual conditions precedent to the admission of such evidence. This is in accordance with the provisions of Article VII, Ordinance No. 7, Military Government, Germany, which provides: "The tribunals shall not be bound by technical rules of procedure, and shall admit any evidence which they deem to have probative value. Without limiting the foregoing general rules, the following shall be deemed admissible if they appear to the tribunal to contain information of probative value relating to the charges, affidavits, depositions, interrogations, and other statements, diaries, letters, the records, findings, statements and judgments of the military tribunals and the reviewing and confirming authorities of any of the United Nations, and copies of any document or other secondary

evidence of the contents of any document, if the original is not readily available or cannot be produced without delay. The tribunal shall afford the opposing party such opportunity to question the authenticity or probative value of such evidence as in the opinion of the tribunal the ends of justice require." This tribunal is of the opinion that this rule applies to the competency of evidence only and does not have the effect of giving weight and credibility to such evidence as a matter of law. It is still within the province of the tribunal to test it by the usual rules of law governing the evaluation of evidence. Any other interpretation would seriously affect the right of the defendants to a fair and impartial trial. The interpretation thus given and consistently announced throughout the trial by this tribunal is not an idle gesture to be announced as a theory and ignored in practice, - it is a substantive right composing one of the essential elements of a fair and impartial adjudication.

The trial was conducted in two languages, English and German, and consumed 117 trial days. The prosecution offered 678 exhibits and the defendants 1025 that were received in evidence. The transcript of the evidence taken consists of 9556 pages. A careful consideration of this mass of evidence and its subsequent reduction into concise conclusions of fact, is one of the major tasks of the tribunal.

The prosecution has produced oral and documentary evidence to sustain the charges of the indictment. The documents consist mostly of orders, reports and war diaries which were captured by the Allied Armies at the time of the German collapse. Some of it is fragmentary and consequently not complete. Where excerpts of such documents were received in evidence, we have consistently required the production of the whole document whenever the defense so demanded. The tribunal and its administrative officials have made every effort to secure all known and available evidence. The prosecution has repeatedly assured the tribunal that all available evidence, whether favorable or otherwise, has been produced pursuant to the tribunal's orders.

The reports offered consist generally of those made or received

by the defendants and unit commanders in their chain of command. By the general term "orders" is meant primarily the orders, directives and instructions received by them or sent by them by virtue of their position. By war diaries is meant the records of events of the various units which were commanded by these defendants, such war diaries being kept by the commanding officer or under his direction. This evidence, together with the oral testimony of witnesses appearing at the trial provides the basis of the prosecution's case.

The defense produced much oral testimony including that of the defendants themselves. Hundreds of affidavits were received under the rules of the tribunal. All affidavits were received subject to a motion to strike if the affiants were not produced for cross-examination in open court upon demand of the opposite party made in open court.

In weighing and evaluating this evidence, it was necessary to ascertain the nature of the chains of command and the general military structure in the involved territory. The correct subordination of military units as to time and place was sometimes important. Orders given and received had to be tested as to claimed literal or general meanings often made in accordance with the interest of the claimant. We have been confronted repeatedly with contentions that reports and orders sent to the defendants did not come to their attention. Responsibility for acts charged as crimes have been denied because of absence from headquarters at the time of their commission. These absences generally consisted of visitations to points within the command area, vacation leaves and leaves induced by illness. It is claimed also that many of the acts charged were committed by units not subordinated to them or by independent units subordinated to agencies other than the German Wehrmacht. It is contended generally by these defendants that they signed no orders for the performance of specific acts which are charged as war crimes, a fact which is undoubtedly due to their high rank and their indirect control only of troops in the field.

We desire to point out that the German Wehrmacht was a well equipped,

COURT V CASE VII

19 Feb 48-6-7-M-AMH-Stone (Schaeffer)

well trained and well disciplined army. Its efficiency was demonstrated on repeated occasions throughout the war.

There is some evidence that the troops in the Southeast were overage and not as well fitted for duty there as they might have been. The evidence shows, however, that they were led by competent commanders who had mail, telegraph, telephone, radio and courier service for the handling of communications. Reports were made daily, sometimes morning and evening. Ten day and monthly reports recapitulating past operations and stating future intentions were regularly made. They not only received their own information promptly but they appear to have secured that of the enemy as well. We are convinced that military information was received by these high-ranking officers promptly, a conclusion prompted by the known efficiency of the German Armed Forces.

An army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein. It would strain the credulity of the tribunal to believe that a highranking military commander would permit himself to get out of touch with current happenings in the area of his command during war time. No doubt such occurrences result occasionally because of unexpected contingencies, but they are the unusual. With reference to statements that responsibility is lacking where temporary absence from headquarters for any cause is shown, the general rule to be applied is dual in character. As to events occurring in his absence resulting from orders, directions or a general prescribed policy formulated by him, a military commander will be held responsible in the absence of special circumstances. As to events, emergent in nature and presenting matters for original decision, such commander will not ordinarily be held responsible unless he approved of the action taken when it came to his knowledge.

The matter of subordination of units as a basis of fixing criminal responsibility becomes important in the case of a military commander

having solely a tactical command. But as to the commanding general of occupied territory who is charged with maintaining peace and order, punishing crime and protecting lives and property, subordinations are relatively unimportant. His responsibility is general and not limited to a control of units directly under his command. Subordinate commanders in occupied territory are similarly responsible to the extent that executive authority has been delegated to them.

Much has been said about the participation of these defendants in a preconceived plan to decimate and destroy the populations of Yugoslavia and Greece. The evidence will not sustain such a charge and we so find. The only plan demonstrated by the evidence is one to suppress the bands by the use of severe and harsh measures. While these measures progressively increased as the situation became more chaotic, and appeared to have taken a more or less common course, we cannot say that there is any convincing evidence that these defendants participated in such measures for the preconceived purpose of exterminating the population generally.

Neither will the evidence sustain a finding that these defendants participated in a preconceived plan to destroy the economy of the Balkans. Naturally there was a disruption of the economy of these countries but such only as could be expected by a military occupation. There were unlawful acts that had the effect of damaging the economy of Yugoslavia and Greece, possibly the result of a preconceived plan, but the evidence does not show the participation of these defendants therein.

There is evidence to the effect that certain reports and entries in the war diaries do not reflect the truth and were not intended to do so. The explanation is made that certain orders received from the High Command were so harsh and severe that resort was had to subterfuge to appease the insistent demands of superiors. It is asserted, for example, that the number of reprisals taken against the population was increased

above the actual number for this purpose and that the number of killings was inflated for the same reason. In this connection we desire to point out that the records of the German Army are mute evidence of the events and occurrences which they themselves made. Statements contained therein which are adverse to the interests of the defendants approach the status of admission against interest. If the evidence and circumstances sustain such an assertion of falsity, we will of course give credence to it, but there are limitations beyond which the most credulous court cannot go.

In determining the guilt or innocence of these defendants, we shall require proof of a causative, overt act or omission from which a guilty intent can be inferred, before a verdict of guilty will be pronounced. Unless this be true, a crime could not be said to have been committed unlawfully, wilfully and knowingly as charged in the indictment.

In making our findings of fact, we shall give effect to these general statements except where a contrary application is specifically pointed out. We shall impose upon the prosecution the burden of proving its case beyond a reasonable doubt. We shall also adhere to the rule that the defendants will be presumed innocent until proven guilty by the required quantum of competent evidence. With these general statements in mind, we shall turn to a consideration of the charges against the individual defendants.

A brief historical background is helpful in dealing with issues here involved. The troubles of the German Wehrmacht in the Balkans began in October 1940 with the commencement of the war on Greece by Italy. Until that occurrence, Greece was a neutral nation and immune to invasion by the allied powers without the violation of fundamental concepts of the rights of neutrals. The attack on Greece by Italy, an ally of Germany, transformed that country into an active belligerent which welcomed the aid of the allied powers. The failure of the Italian forces to subjugate Greece opened the way to possible invasion of continental Europe by allied forces. To prevent such a contingency, Germany

deemed it necessary to occupy Greece. Arrangements were made for the passage of troops through Bulgaria for the attack on Greece and a treaty was made with the then existing government of Yugoslavia which insured non-action on its part. A few days after the making of the treaty with Yugoslavia, strong opposition developed in that country which resulted in the overthrow of the government and a disavowal of the treaty. The Germans, deeming it a military necessity to protect against the possibility of an attack from the rear and a disruption of its supply lines, determined to crush Yugoslavia as a part of the campaign against Greece. Once again international law gave way to military expediency on the part of the German Wehrmacht and neutral Yugoslavia was invaded. As we have heretofore shown, both countries were overrun and the German Wehrmacht became occupants within the meaning of international law.

The territory was particularly favorable to the guerrilla warfare which soon broke out. Local political, religious and racial conflicts had provided a training ground for this sort of fighting. The various conflicting elements of the population, over a period of time, were gradually welded into a common partisan front. The guerrilla methods of the partisans and the attempts of the Wehrmacht to eliminate them by a campaign of intimidation provides the basis for the prosecutions here brought.

A similar situation developed in Greece after the capitulation of the Greek armies. While it is true that the partisans of Greece were never able to organize a common front to the extent it was done in Yugoslavia, the methods of the various partisan organizations were very much the same. Guerrilla tactics were employed. German troops were ambushed; transportation and communication systems sabotaged. The capture of the perpetrators was next to impossible. Again draconic measures of terrorism and intimidation were indulged in in an attempt to subjugate the country. It was with this situation that List, Kuntze, Lochr and von Weichs had to deal in their capacities as over-all commanders

19 Feb 48-M-AJ-7-5-Urney-Schaeffer

Court 5 Case 7

in the southeastern area.

THE PRESIDENT: The Tribunal will be in recess for fifteen minutes.

(A recess was taken.)

THE MARSHAL: All persons in the Courtroom please take their seats.

The Tribunal is again in session.

THE PRESIDENT: Judge Burke will continue reading the opinion.

The Defendant Wilhelm List was the fifth ranking Fieldmarshal in the German Army. He was a thoroughly trained and experienced military commander. He was the commander-in-chief of the Twelfth Army during the invasion of Yugoslavia and Greece, and, in addition thereto, in June, 1941, became the Armed Forces Commander Southeast, a position he retained until illness compelled his temporary retirement from active service on 15 October 1941. From July to September, 1942, he was returned to active service as commander-in-chief of Army Group A, an army group operating on the Russian front. He stands charged on all four counts of the indictment.

On 9 June 1941, Hitler appointed the defendant List to be Wehrmacht Commander in the Southeast with headquarters in Salonika. His commission provided that the Wehrmacht Commander Southeast is the supreme representative of the Wehrmacht in the Balkans and exercises executive authority in the territory occupied by German troops. Directly subordinated to him were the "Commander Serbia", the "Commander Salonika-Aegea" and the "Commander of Southern Greece". Among the duties assigned was the safeguarding of the unified defense of those parts of Serbia and Greece, including the Greek Islands, which were occupied by German troops, against attacks and unrest. The defendant Foertsch, who had become Chief of Staff of the Twelfth Army on 10 May 1941, continued as Chief of Staff to the defendant List in his new capacity as Wehrmacht Commander Southeast.

The record shows that attacks on German troops and acts of sabotage against transportation and communication lines progressively increased throughout the summer of 1941. Even at this early date, the shooting of innocent members of the population was commenced as a means of suppressing resistance. Excerpts from the war diaries and orders

of the participating units reveal, for example, that on 5 July 1941 thirteen communists and Jews were killed in reprisal in Belgrade; on 20 July 1941, fifty-two communists, Jews and members of families of band members were killed in reprisal for the attack on General Lontschar; on 25 July 1941, 100 Jews were killed in Belgrade because a sixteen year old Serbian girl threw a bottle of gasoline at a German motor vehicle at the alleged instigation of a Jew; on 29 July 1941, one hundred and twenty-two communists and Jews were killed in Belgrade in reprisal for acts of sabotage; and many other orders and reports showing the shooting of hundreds of the inhabitants in reprisal. On 5 September 1941 the resistance movement had developed to such a point that the defendant List put out an order on the subject of its suppression. In this order, he said in part: "In regard to the above the following aspects are to be taken into consideration: * * *

Ruthless and immediate measures against the insurgents, against their accomplices and their families. (Hangings, burning down of villages involved, seizure of more hostages, deportation of relatives, etc., into concentration camps)."

On 16 September 1941, Hitler in a personally signed order, charged the defendant List with the task of suppressing the insurgent movement in the Southeast. This resulted in the commissioning of General Franz Boehme with the handling of military affairs in Serbia and in the transfer of the entire executive power in Serbia to him. This delegation of authority was done on the recommendation and request of the defendant List to whom Boehme remained subordinate.

On 16 September 1941, Fieldmarshal Keitel, Chief of the High Command of the Armed Forces, issued a directive pertaining to the suppression of the insurgent movement in occupied territories. The pertinent parts of this order are: "Measures taken up to now to counteract this general communist insurgent movement have proven themselves to be inadequate. The Fuehrer now has ordered that severest means are to be employed in order to break down this movement in the shortest time possible. Only in this manner, which has always been applied successfully in the history of the extension of power of great peoples can quiet be restored.

"The following directives are to be applied here: (a) Each incident of insurrection against the German Wehrmacht, regardless of individual circumstances, must be assumed to be of communist origin. (b) In order to stop these intrigues at their inception, severest measures are to be applied immediately at the first appearance, in order to demonstrate the authority of the occupying power, and in order to prevent further progress. One must keep in mind that a human life frequently counts for naught in the affected countries and a deterring effect can only be achieved by unusual severity. In such a case the death penalty for 50 to 100 communists must in general be deemed appropriate as retaliation for the life of a German soldier. The manner of execution must increase the deterrent effect. The reverse procedure - to proceed at first with relatively easy punishment and to be satisfied with the threat of measures of increased severity as a deterrent does not correspond with these

principles and is not to be applied." This order was received by the defendant List and distributed to his subordinate units.

On 25 September 1941, General Boehme issued an order to his subordinate units in part as follows:

"After dissemination, destroy!

"In March of this year, Serbia shamefully broke the friendship treaty with Germany, in order to strike the German units marching against Greece in the back.

"German revenge stroved across the country.

"We must turn to new, greater goals with all our forces at hand. For Serbia, this was the sign for a new uprising, to which hundreds of German soldiers have already fallen in sacrifice. If we do not proceed here with all means and the greatest ruthlessness, our losses will climb to unmeasurable heights.

"Your mission lies in carrying out reconnaissance of the country in which German blood flowed in 1914 through the treachery of the Serbs, men and women.

"You are avengers of these dead. An intimidating example must be created for the whole of Serbia, which must hit the whole population most severely.

"Everyone who wishes to rule charitably sins against the lives of his comrades. He will be called to account without regard for his person and placed before a court martial."

On 28 September 1941, Fieldmarshal Keitel directed the following order to the defendant List:

"Because of the attacks on members of the Wehrmacht which have taken place lately in the occupied territories it is pointed out, that it is opportune for the military commanders to have always at their disposal a number of hostages of the different political persuasions, - i.e. (1) Nationalists (2) Democratic Middle-Class, and (3) Communists.

"It is of importance that among these are leading personalities or members of their families. Their names are to be published.

"In case of an attack hostages of the group corresponding to that to which the culprit belongs are to be shot.

"It is requested that commanders be informed in this sense."

On 4 October 1941, the defendant List directed the following order to General Bader, the Plenipotentiary Commanding General in Serbia:

"The male population of the territories to be mopped up of bandits, is to be handled according to the following points of view:

"Men who take part in combat are to be judged by court martial.

"Men in the insurgent territories who were not encountered in battle, are to be examined and ---

"If a former participation in combat can be proven of them to be judged by court martial.

"If they are only suspected of having taken part in combat, of having offered the bandits support of any sort, or of having acted against the Wehrmacht in any way, to be held in a special collecting camp. They are to serve as hostages in the event that bandits appear, or anything against the Wehrmacht is undertaken in the territory mopped up or in their home localities, and in such cases they are to be shot."

On 10 October 1941, General Boehme issued an order to military units under his command relative to the crushing of the insurgent movement, the applicable parts of which are:

"In all commands in Serbia all Communists, male residents suspicious as such, all Jews, a certain number of nationalistic and democratically inclined residents are to be arrested as hostages, by means of sudden actions. It is to be explained to these hostages and to the population that the hostages will be shot in case of attacks on Germans or Volksdeutsche. * * * *

"If losses of German soldiers or Volksdeutsche occur, the territorial competent commanders up to the regiment commanders are to decree the shooting of arrestees according to the following quotas:

(a) For each killed or murdered German soldier or Volksdeutsche (men, women or children) one hundred prisoners or hostages. (b) For each wounded German soldier or Volksdeutsche 50 prisoners or hostages.

"The shootings are to be carried out by the troops.

"If possible, the execution is to be made in the daily reports, whether and to what extent the reprisal measure is carried out or when this will be finished.

"In the burying of those shot, care is to be taken that no Serbian memorials arise. Placing of crosses on the graves, decoration, etc, is to be prevented. Burials are accordingly to be carried out best in distant localities.

"The Communists captured by the troops in combat actions are to be hanged or shot as a matter of principle at the location in question as a frightening measure. Localities which have to be taken in combat are to be burned down, as well as farms from which troops were shot at."

After the issuance of the foregoing orders, the shooting of innocent members of the population was stepped up. Acts of sabotage increased and attacks on German military personnel continued unabated. The evidence is conclusive that a large number of reprisals against the population were carried out on the basis of the 100 to 1 order. Space will not permit a detailed account of each of these actions. We shall content ourselves with a recitation of the facts of one incident that bears similarity to many others shown by the record.

On 2 October 1941, at a small village near Topola, a troop unit of the 521 Army Signal Regiment consisting of two officers and 45 men was ambushed from the cornfields along the road on which they were traveling. A few dead and wounded were found at the scene of the attack. In a small valley near by, other dead soldiers were found. A survivor who escaped being killed by feigning death, gave information that these men had been lined up and killed by the partisans by machine gun fire. The total casualties consisted of 22

dead, 3 wounded and 15 or 16 missing. The incident was reported through regular channels to higher commanding officers.

On 4 October 1941, General Boehme issued an order of reprisal for the killing near Topola which was in part as follows: "21 soldiers were tortured to death in a bestial manner on the 2nd of October in a surprise attack on units of the signal regiment between Belgrade and Obrenovac. As reprisal and retaliation, 100 Serbian prisoners are to be shot at once for each murdered German soldier. The Chief of the Military Administration is requested to pick out 2100 inmates in the concentration camps Sabac and Belgrade (primarily Jews and Communists) and to fix place and time as well as burial place. The shooting details are to be formed from the 432 Division (for the Sabac concentration camp) and from the 449th Corps Signal Battalion (for the Belgrade concentration camp.)"

On 9 October 1941, General Boehme informed the defendant List as follows: "Execution by shooting of about 2000 Communists and Jews in reprisal for 22 murdered of the Second Battalion of the 421st Army Signal Communication Regiment in progress."

Another report distributed to the 12th Army commanded by the defendant List stated 180 men were executed on 9 October 1941 and that an additional 260 were executed on 11 October 1941. After the killing of the 449 men, the psychological effect upon the participating units was such that a transfer of the mission was made to another unit.

On 9 October 1941, the Chief of the Security Police and of the SD reports: "In reprisal for the 21 German soldiers shot to death near Topola a few days ago 21000 Jews and Gypsies are being executed. The execution is carried out by the German Wehrmacht. The task of the Security Police is merely to make available the required number, 805 Jews and Gypsies are taken from the camp in Sabac, the rest from the Jewish transit camp Belgrade." On 20 October 1941, the Chief of the Security Police and of the SD in Berlin reported to the Armed Forces Commander Southeast as follows: "In reprisal for 21 dead German Wehrmacht soldiers, 2100 Jews from the Jewish camp were made available for execution by order of Corps Headquarters 18. The Wehrmacht is carrying out the execution."

On 21 October 1941, the Chief of the Security Police and the SD reported to the Armed Forces Commander Southeast in part as follows: "After ruthless action by the troops was bound to fail up to the time of the employment of the Plenipotentiary Commanding General in Serbia because of the lack of corresponding orders, Lt. General Boehme's order, according to which 100 Serbs will be executed for every soldier killed and 50 for every soldier wounded, has established a completely clear-cut line for action. On the strength of this order, for instance, 2200 Serbs and Jews were shot in reply to an attack on a convoy near Topola, during which 22 members of the Wehrmacht perished, while in return for the soldiers killed in the fight for Kraljevo so far 1736 inhabitants and 19 Communist women from Kraljevo have been executed."

The evidence shows that after the capitulation of the armies of Yugoslavia and Greece, both countries were occupied within the meaning of international law. It shows further that they remained occupied during the period that List was Armed Forces Commander Southeast. It is clear from the record also that the guerrillas participating in the incidents shown by the evidence during this period were not entitled to

be classed as lawful belligerents within the rules herein before announced. We agree, therefore, with the contention of the defendant List that the guerrilla fighters with which he contended were not lawful belligerents entitling them to prisoner of war status upon capture. We are obliged to hold that such guerrillas were franc-tireurs who, upon capture, could be subjected to the death penalty. Consequently, no criminal responsibility attaches to the defendant List because of the execution of captured partisans in Yugoslavia and Greece during the time he was Armed Forces Commander Southeast.

We find that the "Commissar Order" of 6 June 1941 requiring the killing of all captured Commissars was not issued, distributed or executed in the occupied territory under the command of List while he held the position of Armed Forces Commander Southeast. The charge that such order was issued, distributed and executed by him while serving on the Russian front as Commander-in-Chief of Army Group A, is not established by the record. The evidence fails to show beyond a reasonable doubt that List was in any way responsible for the killing of Commissars merely because they were such. Consequently, the defendant List is found to be not guilty of any crime in connection with the Commissar Order.

The defendant List contends that he never signed an order for the killing of hostages or other inhabitants, or fixed a ratio determining the number of persons to be put to death for each German soldier killed or wounded. The record sustains this contention. It will be observed, however, that as a high-ranking commanding general no such act was ordinarily within the scope of his duties. It discloses, however, that List caused the Keitel Order of 16 September 1941, containing the 100 to 1 ratio to be distributed to his subordinate commanders. This order provided, among other things, that 100 reprisal prisoners should be shot for each German soldier killed and 50 killed for each German soldier wounded. It is urged that the order was worded in such a way

that literal compliance was not required. We do not deem it material whether the order was mandatory or directory. In either event, it authorized the killing of hostages and reprisal prisoners to an extent not permitted by international law. An order to take reprisals at an arbitrarily fixed ratio under any and all circumstances constitutes a violation of international law. Such an order appears to have been made more for purposes of revenge than as a deterrent to future illegal acts which would vary in degree in each particular instance. An order, directory or mandatory, which fixes a ratio for the killing of hostages or reprisal prisoners, or requires the killing of hostages or reprisal prisoners for every act committed against the occupation forces is unlawful. International law places no such unrestrained and unlimited power in the hands of the commanding general of occupied territory. The reprisals taken under the authority of this order were clearly excessive. The shooting of 100 innocent persons for each German soldier killed at Topola, for instance, cannot be justified on any theory by the record. There is no evidence that the population of Topola were in any manner responsible for the act. In fact, the record shows that the responsible persons were an armed and officered band of partisans. There is nothing to infer that the population of Topola supported or shielded the guilty persons. Neither does the record show that the population had previously conducted themselves in such a manner as to have been subjected to previous reprisal actions. An order to shoot 100 persons for each German soldier killed under such circumstances is not only excessive but wholly unwarranted. We conclude that the reprisal measure taken for the ambushing and killing of 22 German soldiers at Topola were excessive and therefore criminal. It is urged that only 449 persons were actually shot in reprisal for the Topola incident. The evidence does not conclusively establish the shooting of more than 449 persons although it indicates the killing of a much greater number. But the killing of 20

reprisal prisoners for each German soldier killed was not warranted under the circumstances shown. Whether the number of innocent persons killed was 2200 or 449, the killing was wholly unjustified and unlawful.

The reprisal measures taken for the Topola incident were unlawful for another reason. The reprisal prisoners killed were not taken from the community where the attack on the German soldiers occurred. The record shows that 805 Jews and Gypsies were taken from the collection camp at Sabac and the rest from the Jewish transit camp at Belgrade to be shot in reprisal for the Topola incident. There is no evidence of any connection whatever, geographical, racial or otherwise, between the persons shot and the attack at Topola. Nor does the record disclose that judicial proceedings were held. The order for the killing in reprisal appears to have been arbitrarily issued and under the circumstances shown is nothing less than plain murder.

It is further contended that the basic order for the taking of reprisals was issued by the High Command of the Armed Forces to whom the defendant List was subordinate and that this has the effect of relieving him of responsibility. Such a defense is not available to him. An officer is duty bound to carry out only the lawful orders that he receives. One who distributes, issues or carries out a criminal order becomes a criminal if he knew or should have known of its criminal character. Certainly a fieldmarshal of the German Army with more than forty years experience as a professional soldier knew or ought to have known of its criminal nature. That he did know of it is evidenced by the fact that he opposed its issuance and, according to his own statement, did what he could to ameliorate its effect.

The defendant List also asserts that he had no knowledge of many of the unlawful killings of innocent inhabitants which took place because he was absent from his headquarters where the reports came in and that he gained no knowledge of the acts. A commanding general of occupied territory is charged with the duty of maintaining peace and order, punishing crime, and protecting lives and property within

the area of his command. His responsibility is coextensive with his area of command. He is charged with notice of occurrences taking place within that territory. He may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defense. Absence from headquarters cannot and does not relieve one from responsibility for acts committed in accordance with a policy he instituted or in which he acquiesced. He may not, of course, be charged with acts committed on the order of someone else which is outside the basic orders which he has issued. If time permits he is required to rescind such illegal orders, otherwise he is required to take steps to prevent a recurrence of their issue.

Want of knowledge of the contents of reports made to him is not a defense. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.

The reports made to the defendant List as Wehrmacht Commander Wouth-east charge him with notice of the unlawful killing of thousands of innocent people in reprisal for acts of unknown members of the population who were not lawfully subject to such punishment. Not once did he condemn such acts as unlawful. Not once did he call to account those responsible for these inhumane and barbarous acts. His failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence, constitutes a serious breach of duty and imposes criminal responsibility. Instead of taking corrective measures,

he complacently permitted thousands of innocent people to die before the execution squads of the Wehrmacht and other armed units operating in the territory. He contends further that many of these executions were carried out by units of the SS, the SD, and local police units which were not tactically subordinated to him. The evidence sustains this contention but it must be borne in mind that in his capacity as commanding general of occupied territory, he was charged with the duty and responsibility of maintaining order and safety, the protection of the lives and property of the population and the punishment of crime. This not only implies a control of the inhabitants in the accomplishment of these purposes, but the control and regulation of all other lawless persons or groups. He cannot escape responsibility by a claim of a want of authority. The authority is inherent in his position as commanding general of occupied territory. The primary responsibility for the prevention and punishment of crime lies with the commanding general, a responsibility from which he cannot escape by denying his authority over the perpetrators.

The record shows that after the capitulation of Yugoslavia and Greece, the defendant List remained as the commanding general of the occupied territory. As the resistance movement developed, it became more and more apparent that the occupying forces were insufficient to deal with it. Repeated appeals to the High Command of the Armed Forces for additional forces were refused with the demand for a pacification of the occupied territory by more draconic measures. These orders were protested by List without avail. He contends that although such orders were in all respects lawful, he protested from a humanitarian viewpoint. It is quite evident that the High Command insisted upon a campaign of intimidation and terrorism as a substitute for additional troops. Here again the German theory of expediency and military necessity (*Kriegsraison geht vor Kriegsmanier*) superseded established rules of international law. As we have

previously stated in this opinion, the rules of international law must be followed even if it results in the loss of a battle or even a war. Expediency or necessity cannot warrant their violation. What then was the duty of the Armed Forces Commander Southeast? We think his duty was plain. He was authorized to pacify the country with military force; he was entitled to punish those who attacked his troops or sabotaged his transportation and communication lines as franc-tireurs; he was entitled to take precautions against those suspected of participation in the resistance movement, such as registration, limitations of movement, curfew regulations, and other measures hereinbefore set forth in this opinion. As a last resort, hostages and reprisal prisoners may be shot in accordance with international custom and practice. If adequate troops were not available or if the lawful measures against the population failed in their purpose, the occupant could limit its operations or withdraw from the country in whole or in part, but no right existed to pursue a policy in violation of international law.

The record establishes that List was an officer of the "Old School" which quite generally resented the control of the National Socialist Party over the Wehrmacht. That Adolf Hitler in his capacity as Commander-in-Chief of the Armed Forces was generally considered a rank amateur in military matters by this group seems to be quite well established. The subsequent retirement of List "by request" because of a difference of opinion with Hitler on tactical matters during the Russian Campaign further sustains his claimed viewpoint with respect to his relations with Hitler and the National Socialist Party. List states that his views on political matters were not inconsistent with his subsequent military service. It was his opinion that Hitler came to power in a lawful manner and that his obligation as a soldier and his loyalty to his country required him to continue in military service. That he was not in accord with many of the orders of the High Command

of the Armed Forces with reference to the pacification of Yugoslavia and Greece is shown by the record. That his appeals for more troops for the subjugation of the growing resistance movement were met with counter-directives and orders by Hitler and Keitel to accomplish it by a campaign of terrorism and intimidation of the population is amply established. That his orders and directives were more moderate than those of his superiors cannot be questioned. It is clear also that he was continually plagued with the operations of organizations receiving orders direct from superiors in Berlin, such as the SS, the SD, the SA and emissaries of Goering in the administration of his Four Year Plan.

That German prisoners captured by the resistance forces were tortured, mutilated and killed is shown by the evidence. In this connection, we point out the extent to which unlawful reprisals and counter-reprisals may lead. Excesses on the part of troops are bound to occur in any war but certainly they will be more vicious and barbarous if cruelty and harshness constitute the policy of the commanding officers. It is almost inevitable that the murder of innocent members of the population, including the relatives and friends of the franc-tireurs, would generate a hatred that was bound to express itself in counter-reprisals and acts of atrocity. As the severity of the draconic measures of the Wehrmacht were stepped up, so also were the reprisals in answer thereto. There could be but one result, - a completely chaotic condition with an absolute disregard of the laws of war on the part of the fighters of both forces with acts of atrocity progressively increasing. The situation provides adequate proof for the necessity of enforcing the laws of war if torture and barbarity are to be restrained. The failure of the nations of the world to deal specifically with the problem of hostages and reprisals by convention, treaty, or otherwise, after the close of World War I, creates a situation that mitigates to some extent the seriousness of the offense. These facts may not be employed, however, to free the defendant from the responsibility for crimes committed. They are material only to the extent that they bear upon the question of mitigation of punishment.

We conclude therefore that the evidence establishes the guilt of the defendant List beyond a reasonable doubt on Counts One, and Three.

On or about 24 October 1941, the defendant Kuntze was appointed Deputy Wehrmacht Commander Southeast and Commander-in-Chief of the 12th Army. It is evident from the record that the appointment was intended as a temporary one for the period of the illness of Fieldmarshal List. He assumed the command on his arrival in the Balkans on 27 October 1941. He was superseded by General Alexander Loehr in June 1942 but remained in the position until the arrival of General Loehr on 8 August 1942.

The record shows that in June 1940 before coming to the Balkans, the

defendant Kuntze became the commander of the 42 Army Corps. In June 1941, this corps was transferred to East Prussia where it was subordinated to the 9th Army in the fighting against the Russians. From the middle of July 1941 to October 1941, the corps was subordinated to the 18th Army. Pursuant to orders previously received, the corps, on or about 8 October 1941, commenced operations for its transfer to the Crimea which were concluded on 20 October 1941. It was upon the arrival of Kuntze in the Crimea that he received the order to report to Hitler that resulted in his appointment as Deputy Wehrmacht Commander Southeast.

The defendant Kuntze is charged with issuing, distributing and executing the Commissar order of 6 June 1941 wherein Hitler ordered the killing of captured Commissars. In this connection, evidence was offered that from 1 July 1942 to 4 July 1942, captured Commissars were killed by the 217th Infantry Division. The evidence shows that this division was subordinated to the 42nd Corps from August 1941 until the corps was transferred to the Crimea. Consequently, the defendant Kuntze is not chargeable with the acts of the 217th Infantry Division that occurred prior to August 1941. Evidence was also offered showing that units of the 61st Infantry Division killed a number of captured Commissars between 26 September 1941 and 28 October 1941. It is evident that the killing of political Commissars after 6 October 1941 cannot be charged to the defendant Kuntze for the reason that the 42nd Corps was on that date moving to the Crimea. The 61st Infantry Division remained behind and in the very nature of things was no longer subordinate to the 42nd Corps. There appears in the War Diary of the 61st Infantry Division, however, under date of 26 September 1941, a recitation of the shooting to death of saboteurs and commissars by the Field Gendarme Squad 161a, a unit subordinate to the 61st Infantry Division. The defendant Kuntze admits that the 61st Infantry Division was subordinate to him from the middle of September 1941 to the first part of October of the same year. He denies that he ordered any such action or authorized anyone to carry it out. He states that he had never heard of this incident and had no knowledge of the shooting of any Commissar by any unit subordinate to him.

He states further that the army commander to whom he was subordinate had specifically directed him to treat commissars as prisoners of war and that he complied in all respects with that order. We do not think the foregoing evidence is sufficient to hold the defendant criminally responsible for the issuance, distribution or execution of the Commissar Order. Nor does the evidence establish that the Commissar Order was made effective in the Balkan area. It will not sustain a finding that this order was issued, distributed or executed by the defendant Kuntze during the time he was Deputy Wehrmacht Commander Southeast.

This defendant is also charged with issuing, distributing and executing the Commando Order of 18 October 1942 during the period of his command in the Balkans. By this order, issued by Hitler in person, all sabotage troops generally referred to as commandoes, were to be shot immediately upon capture. The record shows that Kuntze was relieved of his command by General Loehr on 8 August 1942. Consequently, the order was not issued until after Kuntze had left the southeastern area. The prosecution has not attempted to disprove this fact and it must be treated as established. The defendant Kuntze has not been shown to have violated any duty with reference to his treatment of commandos or other groups mentioned in the Commando Order.

We hold also that the resistance forces with which we are here concerned were not entitled to be classed as lawful belligerents during the period the defendant Kuntze was Deputy Wehrmacht Commander Southeast. The reasons stated in the treatment of this subject in its relation to the defendant List apply as well to the defendant Kuntze and they will not be repeated here. No criminal responsibility can therefore attach to him because of the killing of captured members of the resistance forces, they being franc-tireurs subject to such punishment.

The defendant Kuntze contends that a right exists to take reprisals by killing hostages and reprisal prisoners in retaliation for the criminal acts of the resistance forces and other unknown persons. He asserts also that members of bands and those supporting them were used for reprisal purposes and that he knew of no instance where a contrary course was

pursued. He denies that excessive and disproportionate reprisals were taken and claims to have had little or no knowledge of the harsh measures taken as shown by the war diaries, orders and reports offered in evidence. He further contends that the measures taken were prescribed by superiors whose orders he was bound to follow. The legal questions thus raised have been dealt with in disposing of the case against the defendant List and will not for reasons of brevity be repeated here. The factual situation will however be examined.

The defendant Kuntze assumed command in the Southeast on 27 October 1941, a month which exceeded all previous monthly records in killing innocent members of the population in reprisal for the criminal acts of unknown persons. On 9 October 1941, 2200 communists and Jews were shot in reprisal for 22 German soldiers of the 521st Signal Regiment murdered at Topola; on 18 October 1941, 1736 men and 19 communist women were shot in reprisal for German losses sustained in the fight for Kraljevo; on 19 October 1941, 182 men were shot to death in Mackovac and 1600 men from Valjevo were shot to death in reprisal for 16 Germans killed and 24 wounded; on 21 October 1941, 2300 Serbs of various ages and professions were shot to death; on 27 October 1941, 101 arrestees were shot to death with further killings to be carried out after more arrestees had been turned in; and on 28 October 1941, 2200 Serbs were shot for 10 German soldiers killed and 24 wounded in action. It seems highly improbable that Kuntze could step into the com and in the Southeast in the midst of the carrying out and reporting of these reprisal actions without gaining knowledge and approval. Reports made to the defendant Kuntze, shown in the evidence, reveal that on 29 October 1941, 76 persons were shot in reprisal in Serbia; on 2 November 1941, 125 persons were shot to death at Valjevo; and on 27 November 1941, 265 communists were shot as a reprisal measure at Valjevo. Under date of 31 October 1941, the Commanding General in Serbia, General Boehme, recapitulated the shootings in Serbia in a report to Kuntze as follows: "Shootings: 405 hostages in Belgrade (total up to now in Belgrade 4750). 90 communists in Camp Sabac. 2300 hostages in Kragujevac. 1700 hostages in Kraljevo." In a similar report

under date of 30 November 1941, General Boehme reported to Kuntze as follows: "Shot as hostages (total) 534 (500 of these by Serbian Auxiliary Police)." Many other similar shootings are shown by the record. Included was a report covering the whole period of the resistance movement up to and including 5 December 1941 wherein it is shown that 31,338 reprisal prisoners were to be shot on the basis of the 100 to 1 order, that 11,164 had been shot and that 20,174 remained to be shot in reprisal to fulfil the quota fixed on the 100 to 1 basis.

THE PRESIDENT: The Tribunal will take its noon recess at this time and reconvene at one-thirty.

THE MARSHAL: The Tribunal will be in recess until thirteen-thirty.

(The Tribunal adjourned until 1330 hours, 19 February 1948).